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No. 07-1144

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RUBIN STERNGASS,

Petitioner,

v.

TOWN OF WOODBURY, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the petitioner has presented compelling reasons to grant his petition where the Second Circuit's order does not conflict with a decision of this Court or a Court of Appeals and is grounded on elementary principles of zoning and real property law?

II. Whether the petitioner has been denied due process or has had his real property taken under the Fifth Amendment to the United States Constitution by the refusal of the Town of Woodbury to permit the petitioner, who had a prior non-conforming use to operate a bungalow colony on his real property during the warm weather months, to develop a trailer park or multi-family residential neighborhood without having to apply to the Town of Woodbury's Board of Zoning Appeals for a variance?

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JURISDICTION

The petitioner seeks a writ of certiorari of the order of the United States Court of Appeals for the Second Circuit affirming the grant of summary judgment to the respondents by the United States District Court for the Southern District of New York. This Court has jurisdiction under 28 U.S.C. § 1254. The basis for jurisdiction stated by the petitioner is incorrect as this case is not a controversy between the United States and a state.

STATEMENT OF THE CASE

This case involves basic principles of zoning and real property law. The petitioner is the owner of real property in the Town of Woodbury ("the Town"), County of Orange, State of New York. Under the Town's Zoning Ordinance of 1928 and subsequent amendments, the petitioner had the right to use his real property as a summer bungalow colony. (App. 4a.)[1] The Town has amended its zoning code numerous times since 1928 culminating in the 1990 zoning ordinance. Under the 1990 zoning ordinance, the use of the subject real property as a summer bungalow colony is no longer a matter of right. Under the 1990 zoning ordinance, single-family houses at the rate of one house per two acres are permitted on the petitioner's real property. The respondents have not disputed that the petitioner has a continuing right to the non-conforming use of his real property as a summer bungalow colony as long as he has not abandoned such use, expanded such use or

1. References to App. denote pages in the appendix to the petition.

sought to use his real property in another manner that is not in conformance with the current zoning code.

The petitioner has expressed a desire to use his real property to develop a trailer park or multi-family residential neighborhood. However, the petitioner has not sought a variance or the re-zoning of his real property to enable him to put it to such use. Instead, he commenced a legal action against the respondents alleging a violation of his civil rights.

The petitioner has asserted that because his real property was subject to a pre-existing, nonconforming use for use as a bungalow colony during the warm weather months, subsequent zoning 2 ordinances have no effect upon the uses and improvement of his real property regardless of what uses and improvement he desires to make. The petitioner has claimed that the 1928 zoning ordinance finally fixed the permissible uses of his real property. The respondents have asserted that zoning ordinances can be, and are, often amended to reflect current development objectives and that if the petitioner desires to make a use of his property for other than a bungalow colony during the warm weather months, he must do so in conformity with the current 1990 zoning ordinance.

The United States District Court for the Southern District of New York granted the respondents summary judgment dismissing the petitioner's complaint in its entirety. (App. 2a – 13a.) The judgment of the Southern District of New York was thereafter affirmed by the United States Court of Appeals for the Second Circuit. (App. 14a – 17a.)

REASONS FOR DENYING THE PETITION

As set forth in Rule 10 of the Rules of the Supreme Court of the United States, review on a writ of certiorari is not a matter of right, but of judicial discretion, and certiorari will be granted only for compelling reasons. This case does not present any compelling reasons warranting review by this Court. None of the reasons set forth in Rule 10 that the Court considers on a petition for writ of certiorari exist in this case. Nor is there any other compelling reason warranting review.

The petitioner seemingly contends that certiorari should be granted because there has allegedly been a taking of his real property under the Fifth Amendment to the United States Constitution without just compensation. The petitioner, as a real property owner, contends that he is entitled to use his real property in any manner "that does not create an injury to his neighbors." (*See* p. 4 of the petition.) As discussed below, the applicable law is well settled that a property owner must be deprived of all use of his property for it to be considered a taking under the Fifth Amendment and, in any event, the petitioner's case is not ripe for review as he has not sought a variance, which means that there has been no final decision rendered by the Town.

I. The Petitioner's Claim That There Has Been A Taking Of His Real Property Under The Fifth Amendment To The United States Constitution Is Not Ripe For Review.

As observed by the district court, the petitioner has not, at any time, applied to the Town's Zoning Board of Appeals for a variance to permit him to use his real property to develop a trailer park or multi-family residential neighborhood. (App. 6a.) Nor has he ever prosecuted any application before the Town for a zoning change. Rather, he has, at all times, appeared before the planning board claiming that his zoning designation was finally fixed by the 1928 zoning ordinance. The current zoning designation of the petitioner's property, which permits single-family dwellings on parcels of two acres, has been completely disregarded by the petitioner.

To make a claim under the Fifth Amendment and seek a federal remedy, the federal courts have required that the case before them be "ripe" for review. By not seeking a variance and receiving a final decision from the Town, the petitioner's claim is not ripe.

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), this Court, in discussing a prerequisite for federal review of a claim of violation of the Fifth Amendment, stated:

> The only issue presented is whether Suitum's claim of a regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under prudential ripeness principles. There

> are two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court. . . . [A] plaintiff must demonstrate that she has both received a "final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations . . . and sought "compensation through the procedures the State has provided for doing so". . . . The first requirement follows from the principle that only a regulation that "goes too far," . . . . results in a taking under the Fifth Amendment."

Suitum, 520 U.S. at 733-734 (citations omitted).

The petitioner, having failed to seek a variance, did not present a ripe claim in the action that he commenced in the district court. As was stated in *Murphy v. New Milford Zoning Com'n*, 402 F.3d 342 (2d Cir. 2005):

> Since labeled "prong-one ripeness," . . . this jurisdictional prerequisite conditions federal review on a property owner submitting at least one meaningful application for a variance. *See Williamson County*, 473 U.S. at 190, 105 S.Ct. 3108 ("[I]n the face of [the developer's] refusal to follow the procedures for requesting a variance" the developer had "not yet obtained a final decision regarding how it [would] be allowed to develop [the] property."); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n. 8, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (holding takings claim

> unripe and stating that a "meaningful [variance] application has not yet been made"). Because the *Williamson County* developer failed to pursue available variance relief the Court concluded that it could not thoroughly consider the merits. *See Williamson County*, 473 U.S. at 191, 105 S.Ct. 3108 (holding that because of the developer's failure to obtain a final decision, the Court cannot evaluate how the regulations at issue would be applied to the particular land in question).

Murphy, 402 F.3d at 353.

Here, the petitioner did not submit an application to the Zoning Board of Appeals for a variance or an application to the Town Board for a change of zoning. Accordingly, the petitioner did not present a ripe Fifth Amendment claim.

Since the petitioner has steadfastly refused to go to the Zoning Board of Appeals for a variance or to go to the Town Board for a change of zoning, the petitioner cannot claim a Fifth Amendment taking. The petitioner's complaints simply do not reach constitutional magnitude without an exhaustion of the petitioner's state remedies.

II. Assuming *Arguendo* That The Petitioner Presented A Ripe Claim, There Has Been No Taking Of His Real Property Under The Fifth Amendment To The United States Constitution.

To rise to the level of a constitutional taking, the petitioner must be deprived of all use of his real property. *See Dean Tarry Corp. v. Friedlander*, 650 F. Supp. 1544 (S.D.N.Y. 1987). In *Dean Tarry Corp.*, the district court stated:

> The inquiry as to whether a restriction on the development of one's property becomes so burdensome as to result in a constitutional taking is essentially an *ad hoc*, factual one. *Penn Central Transportation Co. v. City of New York, 438 US. 104, 123-24, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).* Nonetheless, courts have required that the governmental interest be very substantial to constitute a constitutional taking. The just compensation clause does not require that zoning ordinances permit a landowner to make the most profitable use of his property; the landowner must demonstrate that he has been deprived of all reasonable uses of his land in order to show a constitutional taking. *C.F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974).* Furthermore, substantial devaluations in property value have been held to not constitute constitutional takings. *See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915)* (decline in value from $800,000 to $60,000 caused by a zoning regulation was not sufficient to constitute a constitutionally

> prohibited taking); *Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir. 1984)* (plaintiffs inability to earn a "reasonable return" on its investment does not amount to an unconstitutional taking), *cert. denied, 470 US. 1087, 105 S. Ct. 1854, 85 L. Ed. 2d 151 (1985); William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979)* (decline in value from $2 million to $100,000 not sufficient to constitute a taking), *cert. denied, 445 US. 928, 63 L. Ed. 2d 761, 100 S. Ct. 1315 (1980).*

Dean Tarry, 650 F. Supp. at 1550.

The *Dean Tarry Corp.* court further stated:

> Dean Tarry asserts that what it sees as defendants' flouting of state law provides the basis for a section 1983 claim. It is axiomatic that not every violation of a state statute amounts to an infringement of a constitutional right, *Paul v. Davis, 424 US 693, 700, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)*, and courts have repeatedly rejected similar attempts to create a constitutional question out of a state law violation in the land use area, e.g., *Alton Land Trust v. Alton, 745 F.2d 730, 732 (1st Cir. 1984); Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983); Sucesion Suarez v. Gelabert, 701 F.2d 231, 233 (1st Cir. 1983); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833* (1st Cir.), *cert. denied, 459 US. 989, 74 L. Ed. 2d 385, 103*

S. Ct. 345 (1982); Couf v. DeBlaker, 652 F.2d 585, 590 n.11 (5th Cir. 1981), cert. denied, 455 US. 921, 71 L. Ed. 2d 462, 102 S. Ct. 1278 (1982); Crocker v. Hakes, 616 F.2d 237, 239 n.2 (5th Cir. 1980).

Dean Tarry Corp., 650 F. Supp. at 1551-1552

The petitioner has no constitutional right, or even a state right, to have his property remain zoned as it was in 1928 to the present when the Town has passed other ordinances to reflect more current conditions. *See DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124 (2d Cir. 1998) (noting that "[i]f we were to adopt plaintiffs' position, any owner of zoned land, which presumably includes the vast majority of landowners, would be entitled to assert a claim in federal court alleging a substantive due process violation each time a local governing body rezoned that land . . ."). Although the petitioner claims in his petition that "[t]he property is in an unsaleable state, due to the 'uncertainty of use'" and that "[a] potential developer must make his offer to purchase this property 'subject to' a determination by the Municipality," there is no uncertainty as to the manner in which the petitioner's property may be used, which is the construction of single-family houses with one house per two acres. The petitioner has not been deprived of all use of his real property and, in fact, is permitted by the current zoning ordinance to develop it by the construction of single-family houses on it.

For the foregoing reasons, the petitioner's claim of an unconstitutional taking has no merit and the petitioner has not presented any compelling reason for

this Court to grant review. Like the petitioner's unfounded claim of a constitutional taking of his real property, the petitioner's equal protection and religious discrimination claims simply lack any basis in fact or law, as succinctly set forth by the district court in its decision granting summary judgment to the Town. (App. 10a – 13a.) And, as observed by the district court, the statute-of-limitations on any claim by the petitioner of racial discrimination occurring in 1953 or 1979 would have long since expired.

CONCLUSION

For all of the foregoing reasons, the petitioner has not established any compelling reason for this Court to grant the petition and it is respectfully requested that the petition be denied.

Respectfully submitted,

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